

RESOLUTION NO. _____

**A RESOLUTION OF THE CUPERTINO CITY COUNCIL
ADOPTING THE PROCESS FOR APPLYING FOR AND RECEIVING MINISTERIAL
APPROVAL UNDER SENATE BILL 35**

WHEREAS, Senate Bill 35 added Government Code Section 65913.4 providing for the ministerial approval of infill affordable housing projects.

WHEREAS, the California Division of Housing Development issued Guidelines for implementing SB 35, Streamlined Ministerial Approval Process Guidelines (“Guidelines”) on November 29, 2018.

WHEREAS, these Guidelines direct local jurisdictions to provide information about their process for applying and receiving ministerial approval.

WHEREAS, the City Council now provides that information about its process by this resolution.

NOW, THEREFORE, BE IT RESOLVED that the City Council does hereby adopt the following:

**Process for Applying for and Receiving Ministerial Approval
Under Senate Bill 35**

SECTION 1. **Overview.** Senate Bill 35 (SB 35) enacted Government Code section 65913.4, which requires certain cities and counties to use a streamlined ministerial review process for qualifying multifamily housing developments that comply with the jurisdiction’s objective planning standards, provide specified levels of affordable housing, and meet other specific requirements. The California Department of Housing and Community Development (HCD) determined that Cupertino is subject to SB 35.¹ The HCD issued guidelines for implementing SB 35, *Streamlined Ministerial Approval Process Guidelines* (Guidelines), on November 29, 2018, which took effect on January 1, 2019. These Guidelines direct a local jurisdiction to provide information about its process for applying and receiving ministerial approval under SB 35. Guidelines § 300(a).

Under SB 35, the City is required to review qualifying projects using a ministerial review process, which means that the City cannot require an applicant to obtain discretionary permits that would typically be required (e.g., development permit or conditional use

¹ As of January 31, 2018, HCD determined that Cupertino is subject to SB 35 streamlining for eligible projects. Cupertino remained subject to SB 35 streamlining under HCD’s December 2018 Statewide Determination Summary.

permit). Guidelines § 301(a)(1). Instead, the City is required to process applications within the timeframes specified in Government Code section 65913.4, applying only those objective standards contained the City's General Plan, municipal code, and other adopted land use plans in effect at the time the project application was submitted. Guidelines § 300. The review process is also to be streamlined because the project is not subject to environmental review under the California Environmental Quality Act (CEQA). Guidelines § 301(a)(6).

This Resolution establishes the City of Cupertino's SB 35 application and review processes. It is not intended to supersede or waive any requirements from SB 35 or the Guidelines not explicitly discussed in this document. This Resolution shall be interpreted to incorporate and be consistent with Government Code section 65913.4 and the Guidelines, as they be amended from time to time.

SECTION 2. Eligibility Criteria. To be eligible for a streamlined review process, an application must meet the objective planning standards required by SB 35, including all applicable City objective land use standards, as described in Exhibit 1, the SB 35 Eligibility Checklist. These eligibility criteria are collectively referred to as the required "objective planning standards."

SECTION 3. Procedures for processing SB 35 Applications. To apply for a project that qualifies under SB 35, an applicant must follow the procedures below:

1. Submit an SB 35 Application and a Certificate for Compliance with Eligibility Requirements on forms provided by the Community Development Director to the Planning Division. The application must be submitted along with all of the material identified in an SB 35 Application Checklist provided by the Community Development Director. The SB 35 Application Checklist shall require sufficient information for a reasonable person to determine whether the development is consistent with the required objective planning standards.

SB 35 applications will be subject to a Staff Hourly Rate fee for applicable staff time and materials to process the project application, based on the rates set in the adopted Fee Schedule.

2. The City shall post all application materials on the City's webpage within two business days after the application has been submitted, and keep the project webpage updated including posting any additional submittals from the applicant, initial and final City consistency determinations, and any project approval or denial.

SECTION 4. Completeness Determination. Once the application is submitted, staff will determine within 5 business days whether the application is complete. Applications shall be complete if they contain all documents and other information required by the City, as specified in the SB 35 Application Checklist provided by the Department of Community

Development. *See* Guidelines § 301(b)(1). All of the information in the SB 35 Application Checklist is necessary to determine whether the development is consistent, compliant, or in conformity with the objective planning standards. If the application is incomplete, staff will deny the project, unless doing so would be an invalid basis to deny the project under the Guidelines. *See* Guidelines § 301(b)(1). An applicant may submit a revised application for a previously denied project at any time. The City will process the revised application as a new application under these procedures and the timeframes for consistency determinations and project approval shall commence on the date of resubmittal. Guidelines § 301(a)(4).

SECTION 5.

(a) **Timeframe for Consistency Determination.** If the application is complete, within 60 days of the initial application submittal for a project with 150 or fewer units, and within 90 days for a project more than 150 units, the City will determine whether the project conflicts with any of the required objective planning standards. Guidelines § 301(b).

(b) **Initial Determination.** The Department of Community Development will make an initial written determination of the proposed project's consistency with applicable objective planning standards. The application may be routed to other City department staff for review, if deemed necessary. The Community Development Director shall submit the department's initial consistency determination to the Planning Commission and the City Council for consideration at the Oversight and Consistency Review Meeting.

(c) **Oversight and Consistency Review Meeting.** At least five days before a final consistency determination is made, the Planning Commission and the City Council shall hold a joint oversight meeting to assess the proposed project's compliance with required objective planning standards.

If the project includes an application for a tentative or parcel map, this application will also be considered during the meeting, and the Council and Planning Commission will assess the application's consistency with objective subdivision standards. Gov. Code § 65913.4(c)(2).

The Planning Commission and City Council's oversight shall be objective, involving little or no personal judgement as to the wisdom or manner of carrying out the project, and be strictly focused on compliance with required objective planning standards. *See* Guidelines § 102(n), 301(a)(2). The oversight shall not in any way inhibit, chill, stall, delay, or preclude the ministerial approval. Guidelines § 300(a)(2).

The Oversight Meeting shall be a noticed, open, and public meeting in compliance with the Ralph M. Brown Act. The applicant and members of the public shall have an opportunity to speak as they would at other Planning Commission and City Council meetings.

In addition, the noticing requirements of Municipal Code section 19.12.110A for Development Permits shall apply to the Oversight and Consistency Review Meeting.

(d) City Manager action following Oversight and Consistency Review Meeting. Following the Council and Planning Commission's Oversight and Consistency Review Meeting and before the expiration of the timeframe for a consistency determination, the City Manager will send the applicant either (1) a letter documenting which standard or standards the development conflicts with and an explanation for the reason or reasons the development conflicts with that standard or standards, or (2) a letter stating that the project is consistent with all required objective planning standards and an explanation for reasons the development is consistent with those standards. *See* Guidelines § 301(a)(3).

SECTION 6. Procedure if project is consistent with all objective planning standards. If the proposed development is consistent with all required objective planning standards, the City Manager will prepare final approval documents and standard conditions of approval. *See* Guidelines § 301(a)(5). Within 90 days from the initial project application's submittal for a project with 150 or fewer units, and within 180 days for a project with more than 150 units, the City Manager will provide the project applicant with the final approval documents and standard conditions of approval. Guidelines § 301(b)(3).

SECTION 7. Procedure if application is ineligible for streamlined review. If the City determines that a project conflicts with any required objective planning standard, it will deny the application for streamlined processing under SB 35. The City will not continue to process the application while allowing the applicant to correct any deficiencies. The denial of an application for streamlined processing does not preclude the applicant from correcting any deficiencies and resubmitting a new application for streamlined review or for review under standard City procedures. If the applicant submits a corrected or revised application, the timeframes specified in these procedures shall commence on the date of resubmittal. Guidelines § 301(a).

SECTION 8. Exhibit. The Exhibit to this document may be updated periodically by Planning Division staff in order to respond to changes to the Cupertino Municipal Code or to state law. Staff shall not weaken or remove any requirements unless required to do so by changes in the law.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino
this __day of _____, by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED: _____ Steven Scharf, Mayor City of Cupertino	 _____ Date
ATTEST: _____ Grace Schmidt, City Clerk	 _____ Date

Exhibit 1:
Senate Bill 35 Eligibility Checklist

To be eligible for a streamlined review process under SB 35, an application must meet the objective planning standards required by SB 35, including all applicable City objective land use standards, as described below.

- 1. NUMBER AND DENSITY OF UNITS.** The project must comply with the minimum and maximum residential density range permitted for the site, plus any applicable density bonus. Guidelines § 300(c)(1). If the zoning code's density designation for the site conflicts with the density allowed in the general plan's land use designation, the density in the general plan's land use designation prevails. Gov. Code § 65913.4(a)(5). The project, if eligible, may request a density bonus and/or waivers and/or concessions under the Density Bonus Law (Gov. Code § 65915). Guidelines § 300(b)(3). Any increase in density granted under the Density Bonus Law is considered consistent with maximum allowable densities. Guidelines § 300(b)(3).

In addition:

- (a) The project must propose at least two multifamily residential units. Guidelines §§ 102(o), 400(a).
- (b) If the project is mixed-use, at least two-thirds of the proposed development's square footage must be designated for residential use. Guidelines § 400(b).
 - i. The two-thirds calculation is based upon the proportion of gross square footage of residential space and related facilities to gross development building square footage for an unrelated use, such as commercial or office uses. Structures utilized by both residential and non-residential uses shall be credited proportionally to intended use. Guidelines § 400(b).
 - ii. Related residential facilities are defined as any manager's units and any and all common area spaces that are included within the physical boundaries of the housing development, including, but not limited to, common area space, walkways, balconies, patios, clubhouse space, meeting rooms, laundry facilities, and parking areas that are exclusively available to residential users, except any portions of the overall development that are specifically commercial space. Guidelines § 102(u).
 - iii. Additional density, floor area, or units granted pursuant to Density Bonus Law are excluded from this calculation. Guidelines § 400(b).
- (c) If the development project qualifies for a density bonus under Government Code section 65915, the applicant must submit detailed plans clearly showing location and the square footage of:
 - i. Affordable units that qualify the project for a density bonus,
 - ii. Additional density, floor area, or units granted pursuant to Density Bonus law,

~~ii.iii.~~ The related facilities or proportion of related facilities that serve the Density Bonus law additions.

The plans must be of sufficient detail to verify the square footage of the residential units, related residential facilities, and additional bonus units, floor area, or density granted pursuant to Density Bonus Law and to determine the two-thirds residential requirement. Plans for a “pre-density bonus project” will not be used to calculate the two-thirds requirement. The applicant must also comply with all objective standards relating to density bonus applications found in CMC section 19.56.060.

- (d) Both residential and non-residential components of a qualified mixed-use development are eligible for the streamlined approval process. Guidelines § 400(b)(2). Additional or subsequent permitting requirements pertaining to the individual businesses located in the commercial component (e.g. late night activity, live music or child care use permits) are subject to the City’s General Plan and Development Code requirements. Guidelines § 400(b)(3).

2. **AFFORDABILITY.** The project must provide affordable housing as specified under Government Code section 65913.4(a)(3)(A) and (a)(4)(B) and under Cupertino’s Below Market Rate Housing Program inclusionary zoning ordinance specifically:

- (a) SB 35 projects must reserve at least 50% of their total units as affordable to households making below 80 percent of the area median income in Santa Clara County.² Guidelines § 402(a)(2); *see* § 402(e). As a subset of the SB 35 affordable units, Cupertino’s inclusionary zoning ordinance requires either payment of an Affordable Housing Mitigation Fee or that 15% of the base number of units (total units minus any density bonus units) in a project be reserved as follows:
 - i. For developments that offer rental housing: very low-income and low-income households at a 60:40 ratio.
 - ii. For developments that offer ownership housing: median and moderate income households at a 50:50 ratio. Because SB 35 requires ownership units be made available to households making 80 percent of the area median income, if the project applicant wants to take credit for both SB 35 units and the BMR Program, then the most restrictive requirement would apply and these ownership units

² When jurisdictions have insufficient progress toward their Lower income RHNA (Very Low and Low income) but have had sufficient progress toward their Above Moderate income RHNA, they are subject to the streamlined ministerial approval process for proposed developments with at least 50 percent affordability. Gov. Code § 65913.4(a)(4)(B)(ii). Cupertino has had sufficient progress toward the Above Moderate income RHNA, but not toward the Lower income RHNA, and is therefore subject to streamlining of projects offering at least 50 percent affordability under SB 35 according to the most recent SB 35 Determination Summary, available at http://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary.pdf.

must be made available to households making 80 percent of the area median income rather than median and moderate income households.

- iii. The objective standards in Cupertino's inclusionary zoning ordinance shall apply to the BMR Program subset of the units of the project's affordable units.
- iv. Alternatively, if the project applicant does not wish to provide units subject to Cupertino's BMR Program, it may instead pay the Affordable Housing Mitigation Fee and provide affordable units subject only to SB 35's restrictions.

(b) The applicant must record a land use restriction or covenant providing that the lower income housing units shall remain available at affordable housing costs or rent to persons and families of lower-income (or very low income, as applicable) for no less than the following periods of time, as applicable:

- i. For the units subject to Cupertino's inclusionary zoning ordinance:
 - 99 years or
 - 55 years (if a project financed with low-income housing tax credits (LIHTC))
- ii. For the units subject to SB 35 affordability requirements in excess of Cupertino's inclusionary zoning ordinance:
 - 55 years for rental units
 - 45 years for ownership units

3. **URBAN INFILL.** The project must be located on a legal parcel or parcels within the incorporated City limits. Guidelines § 401(a). At least 75 percent of the perimeter of the site must adjoin parcels that are developed with urban uses. Guidelines §§ 102(j), 400(a). For purposes of SB 35, "urban uses" means any current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses. Guidelines § 102(z). Parcels that are only separated by a street or highway shall be considered adjoined. Guidelines § 102(j).

4. **ZONED OR PLANNED RESIDENTIAL USES.** The project must be located on a site that is either zoned or has a General Plan designation for residential or residential mixed-use development, including sites where residential uses are permitted as a conditional use. Guidelines § 401(a).

5. **CONSISTENT WITH OBJECTIVE STANDARDS.** The project must meet all objective general plan, zoning, design review, and other objective land use standards in effect at the time the application is submitted. Gov. Code § 65913.4(a)(5).

- (a) If the project is consistent with the minimum and maximum density range allowed within the General Plan land use designation, it is consistent with housing density standards. Guidelines § 300(c).
- (b) Modifications to otherwise-applicable standards under density bonus law do not affect a project's ability to qualify for SB 35. Guidelines § 300(c)(3).

(c) Objective standards are those that require no personal or subjective judgment and must be verifiable by reference to an external and uniform source available prior to submittal. Guidelines § 102(p). Sources of objective standards include, without limitation:

- i. General Plan.
- ii. Municipal Code, including, without limitation, the Zoning, Subdivisions, and Building Codes
- iii. Heart of the City Specific Plan
- iv. Monta Vista Design Guidelines
- v. North De Anza Conceptual Zoning Plan
- vi. South De Anza Conceptual Plan
- vii. Saratoga-Sunnyvale Conceptual Plan
- viii. BMR Housing Mitigation Procedural Manual

6. **PARKING.** The project must provide at least one parking space per unit; however, no parking is required if the project meets any of the following criteria. Guidelines § 300(d):

- (a) The project is located within one-half mile of public transit.
- (b) The project is located within an architecturally and historically significant historic district.
- (c) On-street parking permits are required but not offered to the occupants of the project.
- (d) The project is located within one block of a car share vehicle station.

However, if any parking is provided, it must meet the City's objective standards from Chapter 19.124 of the Municipal Code and Public Works Standards. Guidelines § 300(d)(2).

7. **LOCATION.** The project must be located on a property that is outside each of the following areas (*see* Guidelines § 401(b)):

- (a) Either prime farmland or farmland of statewide importance, as defined pursuant to United States Department of Agriculture land inventory and monitoring criteria, as modified for California, and designated on the maps prepared by the Farmland Mapping and Monitoring Program of the Department of Conservation, or land zoned or designated for agricultural protection or preservation by a local ballot measure that was approved by Cupertino's voters.³
- (b) Wetlands, as defined in the United States Fish and Wildlife Service Manual, Part 660 FW 2 (June 21, 1993).

³ As of July 1, 2019, no properties in Cupertino fall within this category. Prior to submitting an application for streamlined review, applicants should confirm with the Planning Division if the listed exclusion is applicable.

- (c) A very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178, or within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection pursuant to Section 4202 of the Public Resources Code. This does not apply to sites excluded from the specified hazard zones by the City, pursuant to subdivision (b) of Section 51179, or sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.
- (d) A hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, unless the Department of Toxic Substances Control has cleared the site for residential use or residential mixed-use.
- (e) A delineated earthquake fault zone as determined by the State Geologist in any official maps published by the State Geologist, unless the development complies with applicable seismic protection building code standards adopted by the California Building Standards Commission under the California Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code), and by any local building department under Chapter 12.2 (commencing with Section 8875) of Division 1 of Title 2.
- (f) A special flood hazard area subject to inundation by the 1 percent annual chance flood (100-year flood) as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency. This restriction does not apply if the site has been subject to a Letter of Map Revision prepared by the Federal Emergency Management Agency and issued to the City or if the applicant can demonstrate that the site will be able to meet the minimum flood plain management criteria of the National Flood Insurance Program.
- (g) A regulatory floodway as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency, unless the development has received a no-rise certification in accordance with Section 60.3(d)(3) of Title 44 of the Code of Federal Regulations.
- (h) Lands identified for conservation in an adopted natural community conservation plan pursuant to the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code), habitat conservation plan pursuant to the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), or other adopted natural resource protection plan.
- (i) Habitat for protected species identified as candidate, sensitive, or species of special status by state or federal agencies, fully protected species, or species protected by the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3

of the Fish and Game Code), or the Native Plant Protection Act (Chapter 10 (commencing with Section 1900) of Division 2 of the Fish and Game Code).

- (j) Lands under conservation easement.
- (k) A site that would require demolition of housing that is:
 - i. Subject to recorded restrictions or law that limits rent to levels affordable to moderate, low, or very-low income households.
 - ii. Subject to rent control.
 - iii. Or has been occupied by tenants within the past 10 years.
- (l) A site that previously contained housing occupied by tenants that was demolished within the past 10 years.
- (m) A property that contains housing units that are occupied by tenants, and units at the property are, or were, subsequently offered for sale to the general public by the subdivider or subsequent owner of the property.
- (n) A parcel of land or site governed by the Mobilehome Residency Law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act, or the Special Occupancy Parks Act.⁴
- (o) A site that would require demolition of an historic structure that is on a local, state, or federal register.

8. **SUBDIVISIONS.** The project does not involve an application to create separately transferable parcels under the Subdivision Map Act. Guidelines § 401(d). However, a subdivision is permitted if the development is consistent with all objective subdivision standards in the subdivision ordinance, and either of the following apply (Guidelines § 401(d)):

- (a) The project is financed with low-income housing tax credits (LIHTC) and satisfies the prevailing wage requirements identified in item 9 of this Eligibility Checklist.
- (b) The project satisfies the prevailing wage and skilled and trained workforce requirements identified in items 9 and 10 of this Eligibility Checklist.

9. **PREVAILING WAGE.** The project proponent must certify that at least one of the following is true (Guidelines § 403):

- (a) The entirety of the project is a public work as defined in Government Code section 65913.4(8)(A)(i).
- (b) The project is not in its entirety a public work and all construction workers employed in the execution of the development will be paid at least the general prevailing rate of per diem wages for the type of work and geographic area.

⁴ As of June 2019, no properties in Cupertino fall within this category. Prior to submitting an application for streamlined review, applicants should confirm with the Planning Division if the listed exclusion is applicable.”

- (c) The project includes 10 or fewer units AND is not a public work AND does not require subdivision.

10. SKILLED AND TRAINED WORKFORCE. If the project consists of 75 or more units that are not 100 percent subsidized affordable housing, the project proponent must certify that it will use a skilled and trained workforce, as defined in Government Code section 65913.4(8)(B)(ii).⁵ Guidelines § 403.

⁵ Beginning January 1, 2022, the skilled and trained workforce requirement is reduced to apply to projects of 50 units or more that are not 100 percent subsidized affordable housing.